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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS BRIAN SPURGIN, Defendant and Appellant.	F075018 (Super. Ct. No. BF163285A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Monique Q. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julia A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Nicholas Brian Spurgin of four separate violations of the Health and Safety Code. Spurgin appeals, contending there was insufficient evidence to sustain the conviction for possession of methamphetamine. In the alternative, if we find there

was sufficient evidence to sustain the conviction, Spurgin contends his counsel was ineffective for failing to object to Deputy Tovar's testimony. Finally, he contends the trial court erred in failing to stay the punishment for count 4 pursuant to Penal Code section 654. We disagree with Spurgin's contentions and affirm.

STATEMENT OF THE CASE

On April 13, 2016, the Kern County District Attorney filed an information charging Spurgin with the following offenses: count 1, manufacturing, compounding, converting, producing, deriving, processing or preparing a controlled substance (Health & Saf. Code,[1] § 11379.6, subd. (a)); count 2, possession of marijuana/concentrated cannabis for sale (§ 11359); count 3, possession of methamphetamine (§ 11377, subd. (a)); and count 4, possession of paraphernalia used for unlawfully smoking a controlled substance (§ 11364). On April 18, 2016, defendant entered a plea of not guilty to all counts.

On December 9, 2016, a jury found Spurgin guilty as to all four counts.

Spurgin was sentenced in January 2017. As to all counts, the trial court imposed a $50 fine, plus penalty assessments, pursuant to section 11372.5 and a $100 fine, plus penalty assessments, pursuant to section 11372.7. The court granted probation for a period of five years as to count 1 and ordered defendant to serve one year in county jail as a term of the probation. As to the remaining counts, probation was denied, and the court ordered Spurgin to serve concurrent terms of 180 days for each count.

STATEMENT OF FACTS

On February 24, 2016, deputies of the Kern County Sherriff's Department conducted a search of a residence located on Thyme Lane, pursuant to a search warrant. Among the deputies who assisted in conducting the search and testified at trial were

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[1] All statutory references are to the Health and Safety Code unless otherwise stated.

Deputy Almanza, Sergeant Cantu, Deputy Monsibais, and Deputy Tovar. When deputies arrived on the scene, Spurgin was in the living room.

Deputy Almanza, who had been with the Kern County Sherriff's Department for eight years, searched the garage, which was attached to the residence. Along the east wall inside the garage, he discovered "a jar which contained papers with honey oil, which [he] recognized based upon [his] training and experience." An expert testified that honey oil is the product of the separation of THC from the marijuana plant and that it is used to obtain a high. Butane cans, a tube glass container, a plastic bag that contained honey oil, and some black tar substance were also recovered. In a separate area of the garage, Deputy Almanza located a black bag that contained two jars filled with honey oil.

Sergeant Cantu, who had been employed with the sheriff's office for 17 years, also searched the garage. He located a desk in the northeast corner of the garage that contained two digital scales, a pill bottle, an Aquafina water bottle that had been made into a pipe, and methamphetamine smoking pipes. Sergeant Cantu testified that there was methamphetamine residue on the inside lining of the pipes, which indicated the pipes had been used in the past. On the north side of the desk, Sergeant Cantu discovered plastic baggies and a gray container that contained marijuana. Sergeant Cantu opined that the proximity of the marijuana to the scales and plastic baggies indicated the marijuana was possessed for the purpose of sales.

Deputy Monsibais had been with the Kern County Sherriff's Department for seven years. He searched the garage and discovered a black bag that "had a good amount of marijuana in it." A security camera was mounted on the exterior of the garage and faced the eastern portion of the driveway.

Deputy Monsibais also searched the northwest bedroom, where he located two cellular phones and a black backpack on the floor. Inside the backpack, Deputy Monsibais found two containers of marijuana, plastic bags, and a black wallet which contained $1,400 in cash and a Visa card bearing the name Nicholas Spurgin. Two

plastic Tupperware containers, which had crystal-like residue on the sides, were also recovered from the bedroom. Deputy Monsibais testified that the residue indicated large amounts of methamphetamine had been stored in the containers. Next to the backpack on the floor, there was a Dr. Pepper can.

Deputy Tovar, who had been a deputy sheriff with the Kern County Sheriff's Office for four and one-half years, conducted a search of the bathroom. In the lower cabinet area of the bathroom, he discovered a small amount of crystal-like residue on top of a Dr. Pepper can. Based on his training and experience, Deputy Tovar identified the residue as methamphetamine and believed it to be a usable amount.

Deputy Tovar received training at an academy to identify various narcotics, including methamphetamine. He testified he had seen methamphetamine hundreds to thousands of times in the field. To identify a substance as methamphetamine, Deputy Tovar testified he was trained to observe, "[j]ust the texture of it, the color of it, or whatever it's packaged in, or where it's located at."

Sergeant Cantu and Deputy Monsibais also testified as to the characteristics of methamphetamine. Sergeant Cantu testified that the characteristics vary depending on the form of the methamphetamine. He testified that methamphetamine in its crystal form "looks like little shards of crystal" and is "a little off-white color." When asked if he could readily identify methamphetamine in the field, Sergeant Cantu stated, "it does have a similarity to a vitamin called MSM that is used to incorporate within the methamphetamine to make it a bigger size" and that "when you have those two things it does take a little bit more of the smell." He added, "the only reason to have [MSM] is so that you can make more methamphetamine than what you have. And you're not going to water down something you're going to use for yourself." Sergeant Cantu testified that a usable amount of methamphetamine is .01 grams.

Deputy Monsibais testified that methamphetamine is a "white crystal-like substance." In terms of the quantity typically found in the field, Deputy Monsibais

explained that the amount of methamphetamine can range from larger shards to, "small grounded up methamphetamine, which is typical when you deal with somebody that either snorts methamphetamine or they're just purchasing a…smaller quantity." Deputy Monsibais opined that a usable amount of methamphetamine is .1 grams.

After Spurgin was placed under arrest in the living room, Deputy Tovar read Spurgin his *Miranda*[2] rights. Deputy Tovar testified that Spurgin indicated he understood each of those rights. Deputy Tovar testified that after Spurgin's rights were read to him, Spurgin stated that "whatever was located at the residence at the house belonged to him." However, when pressed for more information, Spurgin did not specify what items belonged to him. Spurgin did not sign any type of written confession and the conversation was not recorded.

DISCUSSION

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CONVICTION OF POSSESSION OF METHAMPHETAMINE

Spurgin contends first that there was insufficient evidence that he possessed methamphetamine in violation of section 11377, subdivision (a) as alleged in count 3. We disagree.

The appellate standard of review for claims challenging the sufficiency of the evidence requires the court to review the entire record "to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The test is not whether the reviewing court is convinced beyond a reasonable doubt; rather, the court must ask whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*Id*. at p. 576.) Due deference must

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

be accorded to the judgment below, as it is the exclusive function of the trier of fact to weigh the evidence and assess its credibility. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The same standard of review is applied to cases where circumstantial evidence is involved. (*People v. Bean* (1988) 46 Cal.3d 919, 932.)

"[E]vidence that merely raises suspicion, no matter how strong, of the guilt of a person charged with a crime is not sufficient to sustain a verdict and judgment against him." (*People v. Lara* (2017) 9 Cal.App.5th 296, 319, quoting *People v. Draper* (1945) 69 Cal.App.2d 781, 786.) A conviction cannot stand where the evidence against the accused "is so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." (*People v. Reyes* (1974) 12 Cal.3d 486, 500.)

To establish unlawful possession of methamphetamine, the People were required to prove four elements: "(1) defendant exercised control over or the right to control an amount of methamphetamine; (2) defendant knew of its presence; (3) defendant knew of its nature as a controlled substance; and (4) the substance was in an amount usable for consumption." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956, italics added; see § 11377, subd. (a).) The jury was instructed accordingly.

The People bear the burden of proof of establishing the illicit nature of the substance in question. (*People v. Davis* (2013) 57 Cal.4th 353, 362.) Typically, this is proved by a trained expert who has conducted a chemical analysis of the substance. (*People v. Candalaria* (1953) 121 Cal.App.2d 686, 689.) However, chemical analysis is not required, as "the nature of a substance, like any other fact in a criminal case, may be proved by circumstantial evidence. [Citations.] It may be proved … by evidence that the substance was a part of a larger quantity which was chemically analyzed [citation], by the expert opinion of the arresting officer [citation], and by the conduct of the defendant indicating consciousness of guilt. [Citation.]" (*People v. Sonleitner* (1986) 183 Cal.App.3d 364, 369.) For example, in *People v. Galfund* (1968) 267 Cal.App.2d 317, the court found sufficient evidence to prove a substance was heroin where the expert

opinion of the arresting officer was corroborated by other circumstantial evidence. This included the officer's observations of the defendant using heroin paraphernalia to prepare for an injection into the vein of his arm. (*Id.* at p. 321.) In addition, the officer testified that, in the room where the substance was located, he overheard individuals using terminology associated with heroin use. (*Ibid.*)

In the present case, there was sufficient evidence to prove the substance in question was in fact methamphetamine. Deputy Tovar testified that he was trained to identify methamphetamine and that he had seen methamphetamine "hundreds, maybe close to thousands" of times. His conclusion that the crystal-like powder on top of the Dr. Pepper can found in the bathroom was a usable amount of methamphetamine was based on his knowledge and experience in the field. In addition, Deputy Tovar's opinion was supported by other circumstantial evidence. Two pipes used for smoking methamphetamine were discovered in the garage. Both pipes contained methamphetamine residue, which indicated the pipes had previously been used to smoke methamphetamine. Furthermore, Tupperware containers covered with a crystal-like residue, indicating the containers were used to store large amounts of methamphetamine, were found inside the northeast bedroom of the residence. Therefore, we conclude the evidence was sufficient to prove the substance was methamphetamine and reject Spurgin's claim to the contrary.

II. DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Spurgin next contends that, if we find sufficient evidence to uphold his conviction in count 3, defense counsel was ineffective for failing to object to Deputy Tovar's testimony. Spurgin alleges Deputy Tovar was unqualified to opine that the substance was, in fact, methamphetamine.

The United States Constitution and the California Constitution grant criminal defendants the right to effective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 424, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081,

fn. 10.) To ensure this right, criminal defense attorneys have a duty to give competent advice and to evaluate all possible defenses available to the defendant. (*Pope, supra,* at p. 425.)

In order to establish a claim of ineffective assistance of counsel at trial, the defendant must prove that (1) counsel's performance was deficient and (2) the defense was prejudiced as a result of counsel's performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Once a defendant has met these burdens, the appellate court must examine the record to determine whether any explanation was offered for the challenged acts or omissions of counsel. (*People v. Pope, supra,* 23 Cal.3d at p. 425.) If the record does not shed light on the matter, the appellate court must reject the defendant's claim, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*Ibid*.) Instead, it is recommended that the defendant petition for a writ of habeas corpus, which would afford trial counsel the opportunity to explain the challenged acts or omissions. (*People v. Mendoza Tello*, (1997) 15 Cal.4th 264, 267.)

Here, the record does not shed light on counsel's failure to object to Deputy Tovar's qualifications to testify as an expert witness. Furthermore, this is not a case where we can conclude there was no satisfactory tactical motive for not objecting to Deputy Tovar's opinion. For instance, perhaps counsel later had the substance tested, confirming it was in fact methamphetamine. In that case, it would have been strategic for counsel to minimize the issue by not objecting. Therefore, we conclude Spurgin's claim is better suited for a habeas corpus proceeding.

However, given Deputy Tovar's training on identifying methamphetamine and that he had seen methamphetamine "hundreds, maybe close to thousands" of times, it is likely any objection by defense counsel to Deputy Tovar's qualification as an expert witness would likely have been overruled.

III. PENAL CODE SECTION 654 DOES NOT REQUIRE THE TRIAL COURT TO STAY SPURGIN'S PUNISHMENT FOR COUNT 4

Lastly, Spurgin contends that if we affirm the conviction in count 3, the trial court was required to stay the punishment for count 4 pursuant to Penal Code section 654. We disagree.

Penal Code section 654, subdivision (a) states that "[an] act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The phrase "act or omission" within the statute may include either a single act or multiple acts that encompass a single course of conduct. (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) The statute precludes multiple punishments where a single act or course of conduct constitutes more than one criminal violation. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 341.) If the case involves a course of conduct, the court must determine "whether that course of conduct reflects a single '"intent and objective"' or multiple intents and objectives." (*Corpening*, *supra*, at p. 311, quoting *People v. Jones* (2012) 54 Cal.4th 350, 359.) Penal Code section 654 does not apply where the defendant possessed "'multiple criminal objectives,' which were independent of and not merely incidental to each other." (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1043, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In the present case, the jury found Spurgin guilty of possession of methamphetamine pursuant to section 11377 subdivision (a) and possession of paraphernalia used for unlawfully smoking a controlled substance pursuant to section 11364. The record does not indicate how long the pipes or the methamphetamine on the Dr. Pepper can had been inside the residence. However, it is clear from Sergeant Cantu's testimony that the residue inside the pipes indicated the pipes had been used in the past.

Therefore, it is entirely possible that Spurgin acquired the pipes before he acquired the methamphetamine located on top of the Dr. Pepper can. It is also possible that Spurgin intended to ingest the methamphetamine in a manner other than smoking it with one of the pipes located in the garage. In either case, Spurgin's possession of the pipes and his possession of the methamphetamine would be independent of each other. We therefore conclude that the trial court was not required to stay the punishment for count 4 pursuant to Penal Code section 654.

DISPOSITION

The judgment is affirmed.

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FRANSON, J.

WE CONCUR:

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DETJEN, Acting P.J.

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MEEHAN, J.